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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re ROMAN G., a Person Coming Under the Juvenile Court Law.	B270174 (Los Angeles County Super. Ct. No. CK90316)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CESAR G., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Emma Castro, Commissioner. Affirmed.

Jamie A. Moran, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Tracey M. Blount, Senior Deputy County Counsel, for Plaintiff and Respondent.

Cesar G. (father) appeals from the court's order declaring his son, Roman G., a minor described by Welfare and Institutions Code section 300, subdivision (b).[1] He also appeals the order removing Roman from parental custody under section 361, subdivision (c)(1). Father contends the jurisdictional findings and removal order are not supported by substantial evidence. We dismiss the portion of his appeal challenging the court's jurisdictional findings and affirm the removal order.

FACTUAL AND PROCEDURAL BACKGROUND

E.G. (mother) and father have three children, Valerie (born October 1997), Brianna (born February 2002), and Roman (born August 2012). In late 2011, the court sustained allegations that Valerie and Brianna were dependents described by section 300, subdivision (b), based on parents' domestic violence and methamphetamine use. The court ordered the Los Angeles County Department of Children and Family Services (Department) to provide reunification services to both parents, but father never complied with the services, including drug testing. Mother and father are still in a relationship, but have not lived together since the 2011 dependency case began.

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[1] All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

Roman was born in August 2012, but was not added to the ongoing dependency case. Brianna and Valerie were returned to mother's custody on May 23, 2013, and the case was transferred to Orange County shortly thereafter.

In June 2014, the case returned to Los Angeles, and Department social workers attempted to provide family maintenance services to mother and her three children, who struggled with homelessness. Mother was uncooperative with the Department's efforts to stabilize her housing situation. When one social worker was attempting to provide mother with resources for clothing, shelter, and food, "[m]other never appeared . . . to make the necessary effort needed, in order to get anything done." Later, when the Department worked on obtaining a housing voucher, the social worker had to constantly push mother to complete the paperwork to process the application. Mother also failed to enroll Brianna and Valerie in school and counseling, instead making excuses, creating obstacles, and even lying about her daughters' participation in therapy.

Mother missed at least three on-demand drug tests in late 2014 and early 2015. In response to questioning about why she missed a scheduled drug test on February 12, 2015, mother admitted she used methamphetamine on February 9, 2015. At the time, mother and Roman were living in a single apartment. Mother claimed she did not spend much time at the apartment where she "technically lived" because maternal aunt J.G. and J.G.'s family had moved in and mother was aware of their drug use.

On February 17, 2015, police arrested maternal aunt J.G. and maternal uncle E.R. after they admitted using

methamphetamine and leaving drug paraphernalia within the reach of their children. The drug use and arrest took place at mother's address, but mother and Roman were not home at the time. Father, Valerie, and Brianna were living with paternal grandparents.

When a social worker spoke to father on February 27, 2015, about the Department's plan to detain all three children, father said he was unaware of any problems on the case and mother told him everything was going well. Father was upset at the prospect of the children being detained and asked the social worker about what services he needed to complete.

In March 2015, the Department filed a petition under section 300, alleging Roman was a child described by subdivision (b) of that section.[2] The children were detained from both parents and placed with maternal great-aunt B.C. The court also ordered the Department to assess paternal grandparents' home for possible placement there. Both parents appeared at the detention hearing. The court ordered the Department to provide parents with referrals for a drug program and drug testing.

The Department prepared a jurisdiction and disposition report in April 2015. At that time, father had not made himself available to the Department for an interview. On March 24, 2015, paternal grandmother told a social worker that father stays with her. Despite efforts to reach father, he had not contacted the Department. Mother reported that she first discovered father was using drugs in 2009. They began using together and were using until she became pregnant with Roman in early 2012. Brianna guessed that father was using drugs. She had not asked

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[2] The Department also filed a petition under section 387 for the girls, but that petition is not at issue in this appeal.

him or seen him use, but she said, "It's only common sense." The children remained with maternal great-aunt, but mother, Valerie, and Brianna all expressed a preference for the children to live with paternal grandparents instead.

In the period between April and August 2015, maternal great-aunt reported she was having difficulties with the parents during visits. Mother initially visited three times a week, father visited twice a week, and both were critical of how she was caring for the children. Mother told others maternal great-aunt was abusive towards the children. Father told maternal great-aunt not to take the children anywhere because the children will not listen once they are returned to parental custody. The parents' visits became inconsistent. Mother hoped to have children placed with paternal grandparents, but the Department was concerned that paternal grandparents were permitting parents to stay in the house and not being forthcoming with the Department about who was living in the home.

By the adjudication hearing in August 2015, father had missed nine drug tests, had not contacted the social worker to be interviewed, and had not enrolled in any classes. Mother also had not enrolled in any programs.

At the hearing, the court entered the Department's reports into evidence and heard testimony from the prior social worker about mother's drug use and participation in family preservation services. The social worker also testified she had seen father about ten times before ceasing to be the family's social worker in April 2015. She asked father to drug test, but he never did, nor did he provide her with any documentation of his participation in his case plan. After hearing argument from counsel, the court continued the matter to obtain records from the earlier 2011

dependency proceedings. It also ordered the Department to assess paternal cousin V.V. for possible placement of Valerie and Roman.

On October 22, 2015, the court sustained three of the counts alleged in the petition. Count b-1 alleged mother had a four-year history of illicit drug use with admitted methamphetamine use in February 2015, and father knew about mother's drug use and failed to protect Roman. Count b-3 alleged both parents placed Roman at risk of harm by allowing him to frequent the home of maternal relatives who they knew were using methamphetamine, with drug paraphernalia within their children's reach. Count b-4 alleged father's history of illicit drug use and failure to comply with court orders to participate in drug rehabilitation or drug testing.

On January 28, 2016, the court held a disposition hearing to determine whether Roman should remain removed from his parents. Father had not visited the children at all since the last hearing in October 2015, and it had been several months since he was in contact with the Department. After entering the Department's reports into evidence and hearing argument from counsel, the court found by clear and convincing evidence under section 361, subdivision (c), that Roman was at substantial risk of harm, "and there are no reasonable means by which to protect same without removing Roman from the custody of his mother and father. [¶] The court orders the child removed from parents with whom the child resided at the time the petition was filed."

Father filed a timely notice of appeal.

DISCUSSION

Jurisdiction

Father contends the jurisdictional findings involving his conduct are not supported by substantial evidence. Father acknowledges that even if we were to agree with his challenge to the sufficiency of the evidence on appeal, which we do not, the dependency court would retain jurisdiction over Roman because neither mother nor father has appealed the jurisdictional findings against mother. He argues, however, that this court should exercise its discretion to examine the jurisdictional finding against him because it serves as the basis for the court's removal order and is prejudicial to father because of possible implications in future custody determinations in this and future cases. (See *In re Drake M.* (2012) 211 Cal.App.4th 754, 762–763.)

"'[A] jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring [him] within one of the statutory definitions of a dependent. [Citations.] This accords with the purpose of a dependency proceeding, which is to protect the child, rather than prosecute the parent.' [Citations.] The child thus remains a dependent of the juvenile court." (*In re X.S.* (2010) 190 Cal.App.4th 1154, 1161.)

Because mother has not appealed the findings against her, we decline to exercise our discretion to address whether the court erred and we do not reach the merits of father's challenge to the court's jurisdictional findings. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490–1492.) Father's argument that he is somehow prejudiced by the jurisdictional findings is unpersuasive,

particularly in light of the prior sustained findings against him in the 2011 case involving his two older daughters.

Removal order

A. Substantial evidence in support of removal order

Father contends there was insufficient evidence to support the dependency court's order removing Roman from his custody under section 361, subdivision (c)(1). We disagree.

We review a dispositional order removing a child from parental custody for substantial evidence. (*In re D.G.* (2012) 208 Cal.App.4th 1562, 1574.) In other words, "we look to see if substantial evidence, contradicted or uncontradicted, supports [it]. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) Issues of fact and the credibility of witnesses are questions for the trial court. (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 495.) "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.]" (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.) Thus, the pertinent inquiry is whether substantial evidence supports the finding, not whether a contrary finding might have been made. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

Under section 361, subdivision (c)(1), a dependent child may not be removed from a parent unless the dependency court

finds by clear and convincing evidence "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (§ 361, subd. (c)(1).) "'The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.' [Citation.] The court may consider a parent's past conduct as well as present circumstances. [Citation.]" (*In re N.M.* (2011) 197 Cal.App.4th 159, 169–170.)

There is substantial evidence supporting the court's removal order. Roman would be at substantial risk of harm in his father's custody, based on father's ongoing failure, since 2011, to participate in court-ordered programs and drug testing. The record contains numerous reports from the Department stating that father was not in compliance with his case plan. While we do not have specific information about his earlier non-compliance, we do have evidence that father missed at least nine drug tests during 2015. Just as relevant, the record does not contain a single occasion where father tested negative for drugs. Each of father's missed tests are "properly considered the equivalent of a positive test result." (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217.) Since this case returned to Los Angeles in June of 2014, father's interactions with the Department have been minimal. With no evidence that father had addressed the problems that led to the removal of his two older daughters, a court could reasonably conclude that Roman's removal was necessary to protect him from a substantial risk of harm.

B. Statutory authority for removal

Father also argues that the court lacked authority to remove Roman under section 361, subdivision (c), because Roman was not in his custody at the time the petition was filed. Subdivision (c) of section 361 "authorizes a child's removal 'from the physical custody of his or her parents or guardian or guardians *with whom the child resides* at the time the petition was initiated.' (§ 361, subd. (c), italics added.)" (*In re Dakota J.* (2015) 242 Cal.App.4th 619, 628 (*Dakota J.*).) In *Dakota J.*, the juvenile court found clear and convincing evidence supported removal of the mother's three children, but two of the three were not living with the mother at the time the petition was initiated, and had not lived with her for five years. On appeal, the court held that this was error, stating "it is plain that the statute does not contemplate that a child could be removed from a parent who is not living with the child at the relevant time." (*Ibid.*; see also *In re Abram L.* (2013) 219 Cal.App.4th 452, 460 [although the mother did not appeal the dispositional order, the court held the children could not be removed from the father's physical custody under section 361, subdivision (c)(1), because they were not residing with him when the petition was initiated].)

Although the court may have erred in ordering Roman removed from father under section 361, subdivision (c), the record before us does not demonstrate a reasonable probability the result would have been more favorable but for the error. (*In re Celine R.* (2003) 31 Cal.4th 45, 59–60.) Assuming father was a non-custodial parent at the time Roman was removed, the court still possessed authority under either section 361, subdivision (a),

or section 362, subdivision (a), to make reasonable orders limiting father's custody rights to protect Roman from risk of harm. (*In re Julien H.* (2016) 3 Cal.App.5th 1084, 1089, fn. 8; *Dakota J.*, *supra,* 242 Cal.App.4th at pp. 630–632.) Because father cannot demonstrate prejudicial error, we affirm the court's removal order.

DISPOSITION

We dismiss father's appeal of the court's jurisdictional findings and affirm the court's order removing Roman from parental custody.

KRIEGLER, Acting P.J.

I concur:

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BAKER, J., Concurring

I join the majority opinion, except its observation, without qualification, that a missed drug test should be considered the equivalent of a positive drug test. (See *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1304-1305 (conc. opn. of Baker, J.).)

BAKER, J.